No. 92-74

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN,
in his capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION; PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER AND BRIEF OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER'S WRIT FOR CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

TO THE HONORABLE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 37.2, the Multistate Tax Commission (hereinafter, the "Commission") respectfully moves the Court for leave to file the accompanying amicus curiae brief in support of Petitioner.[1] The Commission requested the written consent of all parties to the case. Respondents ACF Industries, Inc., General American Transportation Corporation, General Electric Railcar Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company, and Union Tank Car Company refused to grant their consent.

The Commission is the administrative arm of the Multistate Tax Compact (hereinafter, the "Compact"). ALL ST. TAX GUIDE, ¶701 *et seq.* (RIA 1992); ST. TAX GUIDE, ¶351 (CCH 1992). The Commission currently has nineteen full member States and fourteen associate

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[1]The National Association of Counties also joins in filing the accompanying brief. The National Association of Counties is the only national representative of county government in America. Its missions are to enhance the role of counties in our federal system and to assist county officials in the cost efficient service of the needs of their constituents.

member States.[2] The expressly stated purposes of the Commission are to facilitate proper determination of state and local tax liability of multistate taxpayers; to promote uniformity and compatibility in state tax systems; to facilitate taxpayer convenience and compliance in the filing of tax returns and in tax administration; and to avoid duplicative taxation. In addition to fulfilling the Compact's expressly stated purposes, the Commission, among other things, has historically stood guard against unwarranted federal pre-emption of state taxation. This role of the Commission has resulted from its historical roots--the Compact was developed in 1967 in direct response to proposed federal legislation that would have directed how States were required to tax multistate businesses. *See*, Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N. REV. 1, 1 and 23. The validity of the Compact was recognized by this Court in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452 (1978).

The issues presented in this case are of substantial consequence to the Commission, because they bear directly upon the manner in which the Commission's member and associate member States

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[2]The current full members are the States of Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Alabama, Arizona, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia.

have implemented their property tax systems in our federal system of government that presupposes States with autonomous taxing authority. The property tax is the primary revenue for the legally and politically required services of local government. Without attempting to ascertain Congress' express pre-emptive intent in the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter, the "4-R Act) consistent with the Court's established jurisprudence, the Ninth Circuit's decision has placed state property taxation at risk.

The Commission's role in preventing unwarranted federal pre-emption relevant here takes the form of its Multistate Property Tax Project. This project addresses problems regarding taxation of "centrally assessed" properties that have received or are attempting to receive special congressional protection. The Commission, among other things, has encouraged Congress to amend §306 of the 4-R Act. In furtherance of that objective, the Commission has developed data on the fiscal impact visited on the States as a result of litigation under §306 of the 4-R Act and the unrestricted and expansive judicial interpretations of that section. The Commission views with concern the litigation under the 4-R Act that has expanded federal pre-emption of state taxation of railroads and affiliated industries without any proper consideration of the perspective with which expressly pre-emptive federal legislation should be interpreted under the Court's existing jurisprudence.

The compromise of existing state property tax systems that result from decisions like the case at bar is destructive to state sovereignty because the revenues of property taxes are largely dedicated to supporting fundamental public services and benefits which largely support our national economy and maintain this country's global competitiveness. It is plainly apparent that the hardship imposed by the Ninth Circuit's decision, if extended to other States, will be imposed upon the States and their citizens at a point in time when they are already suffering from fiscal stress. In the Commission's view, expansive interpretations of federal pre-emptive statutes are contributing to deterioration of state fiscal affairs. The Commission desires to submit its *amicus curiae* brief to apprise the Court of these concerns as a backdrop to the Court's determination of review.

WHEREFORE, it is respectfully requested that leave be granted for the Multistate Tax Commission to file the accompanying *amicus curiae* brief addressing the issue of why this case should be heard.

Respectfully submitted,

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In The
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DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his capacity as Director of Revenue of the Department of Revenue of the State of Oregon,

Petitioner,

v.

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BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER'S WRIT FOR CERTIORARI

QUESTIONS PRESENTED

(1) Whether a State imposes a discriminatory tax on railroad property, in violation of §306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the State's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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No. 92-74

In The
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DEPARTMENT OF REVENUE OF THE
STATE OF OREGON, Petitioner,

v.

ACF INDUSTRIES, INC., *et al.*, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MULTISTATE TAX COMMISSION AS AMICUS CURIAE IN SUPPORT OF PETITIONER'S WRIT FOR CERTIORARI

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter, the "Commission") is the administrative arm of the Multistate Tax Compact (hereinafter, the "Compact"). ALL ST. TAX GUIDE

¶701 *et seq.* (RIA 1992); ST. TAX GUIDE ¶351 (CCH 1992). Nineteen States, including the District of Columbia, have adopted the Compact and are full member States of the Commission. In addition, fourteen States are associate members. The expressly stated purposes of the Commission are to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. *Id.* The Court recognized the validity of the Compact in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452 (1978).

In addition to fulfilling the Compact's expressly stated purposes, the Commission, among other things, has historically stood guard against unwarranted federal pre-emption of state taxation. This role of the Commission has resulted from its historical roots--the Compact was developed in 1967 in direct response to proposed federal legislation that would have dictated how States were required to tax multistate businesses. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N. REV. 1, 1 and 23. In this spirit, the Commission has attempted, but not always successfully,[1]

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[1]Limited resources hinder the Commission. Congress also often fails to notify the States when it contemplates pre-emptive legislation. For example, 49 U.S.C.A. §1513(f) (West Supp. 1991) was adopted in the waning hours of the 101st Congress without prior public exposure. Section 1513(f) raises innumerable construction issues that seriously impact on state taxation of the air carrier industry. *See* Mines, *Congress Disrupts State Taxation of Air Carriers Through Passage of 49 U.S.C. §1513(f)*, 1991 MULTISTATE TAX COMM'N. REV. 1.

to prevent unwarranted federal pre-emption of state taxation.

One of the Commission's efforts to defend against unwarranted federal pre-emption is its Multistate Property Tax Project which addresses problems regarding taxation of "centrally assessed" properties that have received special congressional protection, particularly railroads and their affiliated industries. Under the auspices of the Multistate Property Tax Project, the Commission, among other things, has encouraged Congress to amend §306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter, the "4-R Act"). In furtherance of that objective, the Commission has developed data on the fiscal impact visited on the States as a result of litigation under §306 of the 4-R Act and the unrestricted and expansive judicial interpretations of that section. The Commission views with concern the litigation under the 4-R Act that has expanded federal pre-emption of state taxation of railroads and affiliated industries without any proper consideration of the perspective with which expressly pre-emptive federal legislation should be interpreted under the Court's existing jurisprudence.

SUMMARY OF ARGUMENT

The Court should grant the petition for the writ of certiorari because the Ninth Circuit's decision violates this Court's existing jurisprudence that is protective of federalism and, therefore, conflicts with the applicable decisions of this Court. Failure to review this case which would otherwise provide clarity on how the lower courts should determine the

express intent of Congress to pre-empt long-standing, state tax practices will encourage other courts to adopt the Ninth Circuit's flawed interpretative stance. It is particularly important that the Court address this issue because taxpayer use of pre-emption arguments to invalidate long-standing, state practices is increasing. Guidance emanating from Our Federalism is needed specifically in this case, because Congress did not state in adopting the 4-R Act that the existence of state property tax exemptions, however neutral or fairly distributed, would constitute a violation of the Act. Leaving the Ninth Circuit's decision unreviewed will cause States and their citizens to suffer substantial hardship.

ARGUMENT.

I. THERE IS A NEED FOR THE COURT TO STATE CLEARLY THE APPLICABLE STANDARD FOR DETERMINING THE EXTENT OF PRE-EMPTION BY A FEDERAL STATUTE THAT IS EXPRESSLY PRE-EMPTIVE OF STATE TAXATION, BECAUSE LOWER COURTS HAVE REPEATEDLY CONSTRUED THE 4-R ACT IN A MANNER THAT CONFLICTS WITH THE COURT'S EXISTING JURISPRUDENCE.

A. The Determination Of The Extent Of Pre-Emption By An Expressly Pre-Emptive Federal Statute Is In The First Case A Determination Of The Stated Intent of Congress.

There are several recognized tools for a federal court

to employ when interpreting a federal law that impacts on State powers. *See* Petition and Brief of *Amici*, State of Washington, *et al*. Pre-emption analysis using the Court's existing jurisprudence is one of those tools. The Ninth Circuit's analysis of §11503(b)(4)[2] lacks any sensitivity to the impact of its decision on our federal form of government. The Ninth Circuit's decision factors in no moment of concern for interpreting a federal statute as pre-emptive of a long-standing, state tax practice without the support of a clear congressional intent emanating from express statutory language. Specifically, the decision is devoid of any consideration of the Court's existing jurisprudence that applies to congressional legislation pre-empting fundamental or core state sovereign powers. This erroneous approach resulted in the Ninth Circuit's misinterpretation of §11503(b)(4).

Congress (but not the courts) enjoys broad legislative powers under the Commerce Clause even when congressional legislation pre-empts fundamental and core state sovereign powers. Nonetheless, the protection of federalism lies in the political process by which such legislation is adopted. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537-554 (1985), and *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). The requirement for Congress to speak its pre-emptive intent clearly provides

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[2]Because the language of the original §306 was first codified at 49 U.S.C. §26c and was altered slightly when the act went into effect three years later (recodified as 49 U.S.C. §11503 (1988)), the Commission adheres to the convention followed by Oregon in its Petition. *See* Petition at 3-4, notes 3 and 4.

a guarantee for the political process protection, and the courts are not empowered by the Constitution to supply a missing intent. *United States v. Bass*, 404 U.S. 336, 349-350 (1971). The determination of Congress' pre-emptive intent is in the first instance a determination of congressional intent as embodied in the legislation. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738-740 (1985).

Oregon and *Amici*, State of Washington, *et al.*, have fully developed why the Ninth Circuit's interpretation given to §11503(b)4)'s "any other tax" provision fails to square with the congressional intent as reflected from the plain meaning of the language used by Congress in §11503(b)(4) and in §11503(b)(1)-(3). Section 11503(b)(4) simply cannot be construed in the manner of the Ninth Circuit, because its construction of §11503(b)(4) renders the specific provisions of §11503(b)(1)-(3) surplusage. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Moreover, an ambiguous provision of a statute has to be construed in context with other provisions of the same statute and harmonized as a whole. *Stafford v. Biggs*, 444 U.S. 527, 535 (1980).

B. In Interpreting The Extent Of Pre-Emption Of An Expressly Pre-Emptive Federal Statute, The Court Has Recognized That Certain Presumptions Protective Of Federalism Apply.

Oregon's Petition establishes that the Ninth Circuit's interpretation of §11503(b)(4) is erroneous as a matter of simple construction of the plain meaning of that provision.

Oregon's position is solidified when the presumptions that are protective of federalism which apply in this context are employed. Accordingly, this case should be reviewed to allow for a clear indication from the Court as to the appropriate manner for judicial interpretation of the 4-R Act's scope of express pre-emption of state taxation.

For seven Justices of the Court, concerns of federalism require expressly pre-emptive federal legislation to be interpreted using a fair reading of Congress' intent reflected in the statutory language in light of the presumption against pre-emption. *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4707 (U.S. June 24, 1992), *rev'g. in part, aff'g. in part, and rem'g.*, 893 F. 2d 541 (3rd Cir. 1990). Although *Cipollone* dealt with the pre-emption of state "police powers," a State's taxing power is certainly as fundamental to the preservation of state sovereignty. Moreover, expressly pre-emptive statutory language is also interpreted narrowly in the absence of contraindications in the language of the statute being construed. *Cipollone*, 60 U.S.L.W. at 4707; 60 U.S.L.W. at 4711 (Blackmun, J., concurring in part, and dissenting in part). Consequently, the presumption against pre-emption and the required narrow reading of expressly pre-emptive federal legislation provides an interpretative rule for expressly pre-emptive federal legislation.

In addition, the presumption against pre-emption, as well as the requirement to narrowly read expressly pre-emptive federal legislation, recognizes the sensitivity for the important "Federal-State balance" reflected in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991). A presumption opposed to pre-emption and a narrow construction of expressly pre-

emptive federal legislation, in the absence of a contraindication in the statutory language, simply asks Congress to perform its constitutional role by speaking plainly in its legislation. As a result, the presumption against pre-emption and narrow construction of expressly pre-emptive statutes requires a court to be "certain of Congress' intent before finding that federal law overrides" the Federal-State balance. *Gregory*, 111 S.Ct. at 2401 (citation omitted).

Recognition of the principles of *Cipollone* and *Gregory* and their application in this case and state taxation in general does not in any way diminish congressional power. Congress can always provide for a contrary rule of construction with regard to any expressly pre-emptive legislation it passes.[3] Such a recognition ensures that Congress remains the principal determinant of important federal-state boundaries and that the courts do not extend pre-emption beyond that which is expressly intended by Congress. Any other approach shifts the guarantee of federalism from the political process to the *ad hoc* adversarial contentions of litigants of varying skills, resources of time and assets, and litigation strategy adopted to win the case.

The principles announced in *Cipollone* and *Gregory* are of paramount importance to state taxation today. Taxpayers increasingly seek court expansion of expressly pre-emptive federal laws or court insertion of a missing congressional intent to the law. The lower courts are also failing to

[3]For example, Congress could adopt as part of any piece of expressly pre-emptive federal legislation a policy statement setting forth the extent of pre-emption over state action intended by Congress.

consider the principles of federalism and the Court's existing jurisprudence with respect to expressly pre-emptive federal statutes.[4]

From the experience of your *Amicus*, the strategy of those seeking federal pre-emption of state taxation appears to be designed to secure any declaration of a pre-emptive intent from Congress and then to argue about its meaning subsequently in court. This practice derogates Congress' constitutional power to draw the boundary lines affecting federalism. The result of the strategy is that States and their citizens are potentially impacted in ways never actually

[4]*See, e.g., Airborne Freight Corp. v. New York State Dep't. of Taxation and Finance*, 137 A.D. 2d 30, 527 N.Y.S. 2d 107 (App. Div., 3d Dept., 1988) (pre-emption of air transportation carrier franchise tax based on apportioned gross receipts tax as an "indirect" prohibited tax under 49 U.S.C. §1513(a) (1988)); *Davenport Bank and Trust Co. v. Dep't. of Revenue and Finance*, 457 N.W. 2d 610 (Iowa 1990) (pre-emption of state income taxation of interest income on Puerto Rican bonds by extending the federal income tax exemption under 48 U.S.C. §745 (1988) to state taxation); *Morgan Guaranty Trust Co. of New York v. Tax Appeals Tribunal*, No. 61 (N.Y. June 9, 1992) (available at 1992 N.Y. Lexis 1595) (state taxation of the gain on a transfer of real property held by a qualified employee benefit plan held pre-empted by 29 U.S.C. §1144 (1988) (ERISA)); *Dime Savings Bank v. New York*, No. 90-04148 (App. Div., 2d Dept., Jan. 15, 1992) (state mortgage recording fee law held pre-empted by a Federal Home Loan Bank Board regulation, 12 C.F.R. §545.32(b)(5)); and *William Wrigley, Jr., Co. v. Dep't. of Revenue*, 160 Wis. 2d 53, 465 N.W. 2d 800 (1991), *rev'd.*, 60 U.S.L.W. 4622 (U.S. June 19, 1992) (state supreme court held 15 U.S.C. §381 (1988) as requiring a broad construction).

intended by Congress.[5]

The history of litigation under §11503(b)(4) illustrates the manner in which an ambiguous and general provision of a federal statute has been expansively interpreted by courts to the substantial detriment of the States and their citizens. These unjustified interpretations have in effect rendered other specific portions of the 4-R Act meaningless. The 4-R Act litigation is remarkable for the failure of the federal courts to apply the plain meaning rule of statutory construction as supplemented by the principles established by the Court for interpreting expressly pre-emptive congressional legislation. Beginning with *Ogilvie v. State Bd. of Equalization*, 657 F. 2d 204 (8th Cir. 1981),*cert. denied*, 454 U.S. 1086 (1981), for instance, rather than first analyzing the statutory language of §11503(b) to determine its plain meaning or in light of the presumption against pre-emption and in favor of narrow construction of expressly pre-emptive federal statutes, the Eighth Circuit reviewed the legislative history of the 4-R Act and concluded that §11503(b)(4) should be interpreted broadly because the 4-R Act's "purpose was to prevent tax discrimination against railroads in any form whatsoever." 657 F. 2d at 210. Although legislative history may be useful under particular circumstances, this Court has established

[5]*See* 2 STATE TAX NOTES 147 (August 3, 1992), reporting on H.R. 4613, 102d Cong., 2d Sess. (1992) which would require Congress to contemplate the pre-emptive effect of pre-emptive legislation that is proposed. Rep. Thomas, the sponsor, has introduced this bill, among other things, because of Congress' fails to consider fully the impact of its expressly pre-emptive legislation on the States. Identical companion legislation has been introduced in the Senate. S. 2080, 102d Cong., 2d Sess. (1992).

there is no need to look beyond the plain language of an expressly pre-emptive federal statute if it is capable of a plain meaning. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983). Other federal courts have adopted the erroneous interpretative stance first employed by the Eighth Circuit in *Ogilvie*. *See Trailer Train Co. v. State Bd. of Equalization*, 710 F. 2d 468 (8th Cir. 1983); *Burlington Northern R.R. Co. v. Bair*, 766 F. 2d 1222 (8th Cir. 1985); *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415 (8th Cir. 1988), *cert. denied sub nom., Boehm v. Trailer Train Co.*, 490 U.S. 1066 (1989); and *Florida Dep't. of Revenue v. Trailer Train Co.*, 830 F. 2d 1567 (11th Cir. 1987). *But see, Trailer Train Co. v. State Bd. of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982). Obviously, this analysis is contrary to this Court's analysis employed in *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 461 (1987) (legislative history of the 4-R Act is "inconclusive and irrelevant."), and is not consistent with the principles of *Cipollone* and *Gregory*.[6]

Accordingly, this Court should accept review of this case in order to guide the federal courts in interpreting the language contained in §11503(b) and (b)(4) in light of the Court's existing jurisprudence. If this Court refuses to accept

[6]A case pending on protest before the Iowa State Department of Revenue and Finance represents the extreme nature in which §11504(b)(4) is being interpreted by taxpayers. *In the Matter of Burlington Northern R.R. Co.*, No. 91-24-1-0373, the taxpayer is contending that §11503(b)(4) prohibits a State from requiring a special rule of apportionment applicable to railroads for *corporate income tax purposes*. Therefore, §11504(b)(4) is now being used to challenge a state income tax law even though the federal statute is concerned with property taxation.

certiorari, then the Commission is concerned that the federal courts will continue to surmise the intent of Congress in an unwarranted manner, resulting in the undermining of state sovereignty.

II. THE NINTH CIRCUIT'S DECISION WILL RENDER SUBSTANTIAL HARDSHIP ON THE STATES AND THEIR CITIZENS AND REPRESENTS THE CONTINUING EVISCERATION OF STATE PROPERTY TAX SYSTEMS CAUSED BY EXPANSIVE INTERPRETATIONS OF THE 4-R ACT.

A. The Ninth Circuit's Decision Is An Example Of How Expansive Interpretation Of The 4-R Act Is Causing Economic Dislocation For The States And Hardship For Their Citizens.

Litigation under the 4-R Act provides the most extreme example of how well-resourced taxpayers have promoted an expansive interpretation of an expressly pre-emptive federal statute to undermine the valid exercise of state sovereignty. As previously noted above, expansive federal court interpretations of Congress' intent, in the absence of a plainly stated intent to that effect, violate existing jurisprudence of the Court and reflect no concern for federalism. In this portion of the argument, we also show the substantial fiscal impact these decisions have had on the States, local governments, and their citizens.

Amici, State of Washington, *et al.*, have fully developed the fiscal impact which the Ninth Circuit's

decision portends for those States. The Commission has also collected data as part of its Multistate Property Tax Project demonstrating the substantial fiscal impact on the States as a result of litigation under the 4-R Act. *See* Appendix A. This data establishes that since 1979, when the 4-R Act went into effect, the total fiscal impact on the States and their political subdivisions caused by the 4-R Act which applies to a *single industry* has been $607 million. Even if this figure is adjusted to account for tax settlements between States and railroads/carlines and changes in state tax law made as a result of the 4-R Act, the States and their political subdivisions have still been impacted in this *single industry* in the amount of $433 million in foregone property tax revenue. *See* Appendix A. Moreover, an additional $367 million of property tax revenue has been enjoined. *See* Appendix A.

Additional preliminary data collected by the Commission suggests how the forced tax exemption of railroads and their affiliated industries caused by the invalid rationale of the Ninth Circuit's decision will further impact the States and their citizens should the decision be extended outside of Oregon: Fundamental sources of revenue that state ad valorem personal property tax systems represent will be lost at the expense of other citizens of the States who will see funding for essential state services and benefits seriously eroded. Twenty-nine States responded to a recent Commission survey designed to study the potential fiscal impact of the Ninth Circuit's decision on the States. Of those States responding, twenty-three provided estimates of the amount of ad valorem personal property taxes paid in 1990 by railroads and carline companies, in the aggregate. More

than $403 million in ad valorem personal property taxes were estimated by these States to have been paid by railroads and carlines companies in 1990. *See* Appendix B. The existence of personal property tax exemptions available in many of these States (as well as other States which did not respond to the Commission's survey, *see* Brief of *Amici*, State of Washington, *et al.*, App.-A) indicates that the Ninth Circuit's decision may cause a complete disruption of state ad valorem personal property tax systems. *See* Appendix C.

The data which the Commission has collected does not indicate how the potential retroactive effect of the Ninth Circuit's decision will impact the States. To the extent the Ninth Circuit's decision is held to apply retroactively, it is certain the fiscal impact on the States and their political subdivisions and the shifting of tax burdens to other citizens will magnify the impacts set forth in Appendices A and B several times over.[7]

This fiscal impact will not be limited solely to state governments. In order to replace lost sources of substantial

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[7]For example, in *Chicago Freight Co. v. Limbach*, 62 Ohio St. 3d 489, 584 N.E. 2d 690 (1992), the Ohio Supreme Court applied *General American Transportation Corp. v. Limbach*, No. C-2-85-1603 (S.D. Ohio, Dec. 29, 1987), retroactively. *General American* had held Ohio's "carline" tax violated §11503(b)(3) and (4) and Chicago Freight was entitled to recover carline taxes it had paid for the tax years 1983 through 1987. Similarly, the Nebraska Supreme Court held in *Dairyland Power Coop. v. State Bd. of Equalization*, 238 Neb. 696, 472 N.W. 2d 363 (1991), that taxpayers which had paid Nebraska's "car company" personal property tax were entitled to refunds of taxes paid in 1986 as a result of the Eighth Circuit's decision in *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415 (8th Cir. 1988), *supra*.

amounts of revenue traditionally used to fund public services and benefits which benefit not only the citizens of the States but the global competitiveness of the country, tax burdens will be shifted onto captive taxpayers and citizens of the States. The shifting of tax burdens, however, may pose a serious dilemma for the States: The forced tax exemption of railroad and carline company taxpayers has resulted in discrimination claims being lodged by other "centrally assessed" property taxpayers.

B. The Ninth Circuit's Decision And Remedy Potentially Impacts Property Taxation Of Other Centrally Assessed Properties To The Substantial Detriment Of The States And Their Citizens.

The forced exemption of carline companies resulting from the Ninth Circuit's decision (and the fiscal impact on the States under the 4-R Act in general) will likely impose fiscal impacts on the States in addition to those directly related to the railroad and carline industry. The Ninth Circuit's decision will undoubtedly shift a greater share of the property tax burden onto captive taxpayers and citizens of the States. Such a shifting of tax burdens may also lead to claims of discrimination by other centrally assessed property taxpayers due to "an increasing concentration of the tax burden on a shrinking group of taxpayers." *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization*, 238 Neb. 565, 583, 471 N.W. 2d 734, 745 (1991) ("The enforcement of §306(1)(d) by the federal court's enjoining the collection of taxes, and similar relief granted by this court pursuant to

Neb. Const. art. VIII, §1, has had the effect of making Nebraska's system of taxation increasingly discriminatory as to the remaining taxpayers." 238 Neb. at 582, 471 N.W. 2d at 745).

Other States have seen decisions similar to the Ninth Circuit's result in the exemption of other centrally assessed property taxpayers based on discrimination claims brought under federal and state constitutional and statutory provisions. For example, interstate pipeline companies have successfully brought claims against the State of Nebraska based on the tax uniformity provision of the state constitution following the Eighth Circuit's forced tax exemption of railroads and carline companies emanating from *Trailer Train Co. v. Leuenberger*, 885 F. 2d 415, *supra*. *See generally*, *Northern Natural Gas Co. v. State Bd. of Equalization*, 232 Neb. 806, 443 N.W. 2d 249 (1989), *cert. denied*, 110 S.Ct. 1131 (1990); and *Natural Gas Pipeline Co. v. State Bd. of Equalization*, 237 Neb. 357, 466 N.W. 2d 461 (1991). As a result of the involuntary personal property tax exemption forced on Nebraska by the Eighth Circuit in *Trailer Train Co. v. Leuenberger*, *supra*, and the personal property tax exemptions ordered by the Nebraska Supreme Court under the tax uniformity clause of the state constitution in *Northern Natural Gas*, the Nebraska Department of Revenue has estimated that the potential revenue loss to the State is $222.4 million on an annual basis. *See A Property Tax Crisis: Impact of the Recent Nebraska Supreme Court Rulings*, Nebraska Dep't. of Revenue (September 1989).[8] Nebraska's property tax system was thrown into a

[8]*See also* 45 TAX NOTES 452 (October 23, 1989).

state of turmoil for nearly three years until voters approved of a state constitutional amendment to eliminate the ability of other centrally assessed property taxpayers to "piggyback" on the *Leuenberger* decision.[9] Oregon and Washington are also seeing a similar explosion of litigation brought by non-railroad and carline centrally assessed property taxpayers advancing theories seeking tax exemptions based on those which prevailed in Nebraska. *See* Petition at 28-29.

Similarly, as noted in the Petition, other pre-emptive federal legislation with respect to motor carriers and airlines is modeled after §11503. *See* Petition at 28; *See also* note 7, *supra*. These other pre-emptive federal statutes also describe what state property tax systems "unreasonably burden and discriminate against interstate commerce." The statutes use language substantially similar to that contained in §11503(b)(1), (2), and (3) to describe state property tax practices that are unlawful. *See, e.g.*, 49 U.S.C. §11503a(b) (1988) (motor carriers) and 49 U.S.C. §1513(d) (1988) (air carriers). Neither §11503a(b) nor §1513(d) contains a corollary to §11503(b)(4)'s "any other tax" provision. The absence of a corresponding "any other tax" provision, however, has not prevented air carriers from successfully arguing in state court that exemptions mandated under §11503(b)(4) for railroads and carline companies also require the exemption of air carriers under §1513(d). For instance, in *Northwest Airlines, Inc. v. State*, 358 N.W. 2d 515 (N.D. 1984), the North Dakota

[9]L.R. 219CA (Neb., May 12, 1992). Railroads and carline companies, however, retain their favorable exemption from Nebraska personal property taxation.

Supreme Court held that, because railroads and carline companies had been granted personal property tax exemptions as a result of *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468 (8th Cir. 1983), *supra*, (carline exemption), and *Ogilvie v. State Bd. of Equalization*, 657 F. 2d 204 (8th Cir. 1981), *supra*, (railroad exemption), §1513(d) required that air carriers be granted the same complete exemption from North Dakota's personal property tax. According to the North Dakota Supreme Court, the federal court mandated property tax exemption for railroads and carlines discriminated against air carriers whose property was not similarly exempted.

The invalid rationale of the Ninth Circuit's decision to the extent adopted elsewhere will force Oregon and other States to accept one of two unacceptable extremes: (1) They may have to exempt all railroad and carline company tangible personal property from taxation leaving themselves open to claims of discrimination by other centrally assessed property taxpayers; or (2) they may have to eliminate all existing tax exemptions thereby sacrificing important social and economic policies recognized in limited personal property tax exemptions. Elimination of personal property tax exemptions will also create a significant controversy by shifting an increasing tax burden for public services and benefits onto a limited group of captive taxpayers. Neither response is acceptable to the preservation of our federal form of government.

CONCLUSION

For the reasons stated above, this Court should grant Oregon's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Forty States (out of a total of 51, including the District of Columbia) responded to the Commission's Multistate Property Tax Project Survey. The summary of actual fiscal impact on state and local government caused by the 4-R Act from its effective date of February 4, 1979, §2(b), Pub. L. No. 95-473, 92 Stat. 1466 (1978), through March 15, 1992, is set forth below:

Total Dollar Amount of Funds Enjoined Resulting From 4-R Act Cases: . . . . . $367 million

Total Known Dollar Amount of Funds Lost by State and Local Governments Due to 4-R Litigation: $433 million

Total Known Dollar Amount of Funds Lost by State and Local Governments Due to Changes Made in Tax Law or Practice Because of Anticipated 4-R Litigation: . . . . . $47 million

Total Known Dollar Amount of Funds Lost by State and Local Governments in Settlements of 4-R Act Cases: . . . . . $127 million

Total Actual 4-R Dollar Loss Figure Through March 15, 1992, Due to Funds Lost in Litigation, Funds Lost Due to Tax Law or Practice Changes, and Funds Lost Due to 4-R Case Settlements: . . . . . $607 million

Total Actual 4-R Dollar Loss Figure Discounting
Funds Lost Due to Tax Law or Practice Changes
and Funds Lost Due to 4-R Case Settlements: $433 million

The figures reported are cumulative and are based on data reported to the Commission by States responding to the Multistate Property Tax Project Survey. There may be numerous additional 4-R Act cases for which information is not available.

APPENDIX B

Based on preliminary data derived from a survey by the Commission designed to study the potential fiscal impact of the Ninth Circuit's decision if it is extended to other States, twenty-three (23) States supplied information on the estimated ad valorem personal property taxes paid by railroads and carline companies, in the aggregate, to each responding State for the tax year 1990. The following is a state-by-state listing of the dollar amount of ad valorem personal property taxes as reported to the Commission.

Alabama	6,400,000
Arizona	6,594,994
Arkansas	3,000,000
California	2,500,000
Connecticut	7,000,000
Florida	13,390,914
Georgia	10,600,000
Illinois	241,996,784
Iowa	6,900,000
Kansas	14,436,031
Kentucky	2,000,000
Nebraska	15,300,000
North Carolina	4,000,000
North Dakota	2,970,547
Maryland	5,000,000
Missouri	11,400,000
Montana	14,000,000
New Jersey	2,163,800

North Dakota	2,970,547
Utah	6,900,000
West Virginia	8,697,932
Wisconsin	7,600,000
Wyoming	7,381,828
Total	403,203,277

A total of twenty-nine (29) States responded to the Commission's survey. Six States could not provide an estimate on the aggregate amount of ad valorem personal property taxes paid by railroads and carline companies for the tax year 1990. These States were: Delaware, Idaho, Maine, New York, Rhode Island, and Texas.

APPENDIX C

Several States which responded to the Commission's survey provide personal property tax exemptions for business inventories and agricultural property such as equipment, livestock, and produce. *See also* Brief of *Amici*, State of Washington, *et al.*, App. A, for personal property tax exemptions of those States joining as *amici* in that brief.

BUSINESS INVENTORIES EXEMPTIONS

In response to the Commission's survey, Alabama, Connecticut, Georgia, Kansas, Maine, Maryland, Missouri, and Utah indicated they provide an exemption from ad valorem personal property tax for business inventories.

ALA. CODE §40-9-1(23) (1991)
CONN. GEN. STAT. ANN. §12-81(5), (54) (West 1983)
GA. CODE ANN. §48-5-48.1 (Supp. 1992)
KAN. STAT. ANN. §79-201m (Supp. 1991)
ME. REV. STAT. ANN. tit. 36, §655.1.A., B. (West 1990)
MD. TAX & REV. CODE ANN.§7-222 (1986)
MO. CONST. art X, §6.1
UTAH CODE ANN. §59-2-1114 (1992)

AGRICULTURAL EQUIPMENT/OTHER AGRICULTURAL PROPERTY EXEMPTIONS

In response to the Commission's survey, Alabama, Connecticut, Georgia, Kansas, Maine, Maryland, and Utah

indicated they provide an exemption from ad valorem personal property tax for agricultural equipment and other agricultural property such as feed, produce, or livestock.

ALA. CODE §40-9-1(9) and (22) (1991)
CONN. GEN. STAT. ANN. §12-81(38)-(39), (40)-(41), and §12-91 (West 1983)
GA. CODE ANN. §48-5-41(a)(10) (1991)
KAN. STAT. ANN. §79-201d and §79-201i, j (1989)
ME. REV. STAT. ANN. tit. 36, §655.1.C., D., M. (West 1990)
MD. TAX & REV. CODE ANN. §7-219 and §7-222 (1986)
UTAH CODE ANN. §59-2-1112 (1992)